Court, U.S.
E D
1981
, STEVAS,
K

The pa
were:

Appell

Appell
Inc., Heinol
Auchinclos
Exchange,
Penisi.

Appell

Appell

Appell
Buster, Jr.,
ard Welts,
Theodore
Romminger

Appell
& McKinno

TABLE

Question Presented for R

Parties Below .....

Table of Contents .....

Table of Authorities .....

Statutory Provisions Inv

Statement of the Case ....

Summary of Argument ..

Argument

I. The proper fram
1974 Amendmer
the part of Con
plied private re
ity Exchange A

II. Plaintiffs are
whose 'Especia
Exchange Act w

III. The legislative
a Congressiona
causes of action

IV. The continuati
necessary to ef
poses of the Co

V. A private cause
modity Exchan
relegated to sta

Conclusion .....

TABLE OF AUTH

CASES

Abrahamson v. Flescher, 568 F.2d
cert. denied, 436 U.S. 913 (19

Alken v. Lerner, 485 F.Supp. 871

Anderson v. Francis I. DuPont
705 (D. Minn. 1968) .....

Arnold v. Bache & Co., 377 F.S
1973) .....

Baird v. Franklin, 141 F.2d 23
denied, 323 U.S. 737 (1944) .

Bartley v. P. G. Commodities As
Comm. Fut. L. Rep. ¶20,123 [
Binder] (S.D. N.Y. 1975) .....

Berenson v. Madda Trading Co., C
Rep. ¶20,689 (D. D.C. 1978) .

Birenbaum v. Bache & Co., Inc
(Tex. 1977) .....

Booth v. Peavey Company Comm
F.2d 132 (8th Cir. 1970) .....

Brown v. GSA, 425 U.S. 820 (1976

Cannon v. University of Chica
(1979) .....

Case & Co. Inc. v. Board of Tra
Chicago, 523 F.2d 355 (7th C

CIR v. Noel's Estate, 380 U.S. 678

Commissioner of Internal Reven
F.2d 291 (3d Cir. 1961) .....

Cort v. Ash, 422 U.S. 66 (1975) ..

Curran v. Merrill Lynch, Pierce,
Inc., 622 F.2d 216 (6th Cir. 19

Deaktor v. L.D. Schreiber & Co.,
Cir.), *rev'd on other grounds*
Mercantile Exchange v. Deal
(1973) .....

Electric Storage Battery Co. v. Shimadzu, 30
5 (1930) .....

Fischer v. Rosenthal & Co., 481 F.Supp. 53
Tex. 1979) .....

Fischman v. Raytheon Mfg. Co., 188 F.2d 78
Cir. 1951) .....

Francis v. Southern Pacific Co., 333 U.S. 445 (

Goodman v. Hentz & Co., 265 F.Supp. 440 (N.
1967) .....

Gould v. Barnes Brokerage Co., Inc., 345 F.Sup
(N.D. Tex. 1972) .....

*Grand River Dam Authority v. National Gy
Co.*, 352 F.2d 130 (10th Cir. 1965) .....

Hirk v. Agri-Research Council, Inc., 561 F
(7th Cir. 1977) .....

Helvering v. Hallock, 309 U.S. 106 (1940) .....

Hofmayer v. Dean Whittier & Co., Inc., 459 F
733 (N.D. Cal. 1978) .....

International Trading Ltd. v. Bell, 262 Ark. 2
S.W. 2d 420 (1977), *cert. denied*, 436 U.
(1978) .....

J. I. Case v. Borak, 377 U.S. 426 (1964) 1

*Johnson v. Arthur Espey, Shearson, Hammill
341 F.Supp. 764 (S.D. N.Y. 1972) .....

Jones v. B. C. Christopher & Co., 466 F.Sup
(D. Kansas 1979) .....

Karden v. National Gypsum Co., 69 F.Sup
(E.D. Pa. 1946) .....

Lorillard v. Pons, 434 U.S. 575 (1978) .....

McCurnin v. Kohlmeyer & Co., 340 F.Supp
(E.D. La. 1972) *aff'd*, 477 F.2d 113 (5
1973) .....

PAGE

Morton v. Mancari, 417 U.S. 535 (1974) 7

Mullis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 492 F.Supp. 1345 (D. Nev. 1980) 13

Nader v. Allegheny Airlines, Inc., 426 U.S. 290 (1976) 7

Posadas v. National City Bank, 296 U.S. 497 (1936) 7

Seligson v. New York Produce Exchange, 378 F.Supp. 1076 (S.D. N.Y. 1974) 5

Shapiro v. United States, 335 U.S. 1 (1948) 15

Smith v. Groover, 468 F. Supp. 105 (N.D. Ill. 1979) ..9, 22

State of Minnesota v. Coin Wholesalers, Inc., CCH Comm. Fut. L. Rep. ¶20, 407 (Minn., January 3, 1977) 26, 27

Stucki v. American Options Corp., CCH Comm. Fut. L. Rep. ¶20, 559 (CFTC 1978) 8

Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978) 7

Texas and Pacific Railway Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907) 7

Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) .....9, *passim*

Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) .....6, *passim*

Udall v. Tallman, 380 U.S. 1 (1965) 8

United Egg Producers v. Bauer International Corp. 311 F.Supp. 1375 (S.D. N.Y. 1970) 5

United Shoe Workers of America AFL-CIO v. Bedell, 506 F.2d 174 (D. D.C. 1974) 16

Van Vranken v. Helvering, 115 F.2d 709 (2d Cir. 1940), *cert. denied*, 313 U.S. 585 (1941) 15

CONGRESSIONAL DOCUMENTS

PAGE

Bills:

H.R. 13113, 93d Cong., 1st Sess. (1973) 23

Congressional Record:

110 Cong. Rec. 41333 (December 13, 1973) 14

120 Cong. Rec. (1974)

10737 *et seq.* 21

10739 *et seq.* 12

30459 *et seq.* 21

30466 *et seq.* 13

34997 *et seq.* 24

124 Cong. Rec. (1978)

10537 *et seq.* 22, 25

Hearings:

Hearings on S.2485, S.2578, S.2837 and H.R. 13113 before the Senate Committee on Agriculture and Forestry, 93d Cong. 2d Sess. (1974) 14, 15, 23

Hearings on H.R. 11955 before the House Committee on Agriculture, 93d Cong. 2d Sess. (1974) 15

House Reports:

H.R. Rep. No. 421, 74th Cong., 1st Sess. (1935) 12

H.R. Rep. No. 93-975, 93d Cong., 2d Sess. (1974) 12, 16, 24

H.R. Rep. No. 95-1181, 95th Cong., 2d Sess. (1974) 11

Senate Reports:

S. Rep. No. 871, 67th Cong., 2d Sess. (1922) 11

S. Rep. No. 1431, 74th Cong., 1st Sess. (1935) 11

S. Rep. No. 93-1131, 93d Cong., 2d Sess. (1974) 12, 23

MISCELLANEOUS PAGE

ed. Reg. 3994 (January 27, 1976) 8
ed. Reg. 18471 (May 4, 1976) 8

STATUTORY PROVISIONS

n Futures Act, Pub.L.No. 67-331, 42 Stat. 998 (1922) 11
modity Exchange Act, ch. 545, 49 Stat. 1491 (1936) ..... 11, *passim*
modity Exchange Act, ch. 545 §5, 49 Stat. 1493-1494 (1936) 12
modity Futures Trading Act, Pub.L.No. 94-463, 88 Stat. 1389 *et. seq.* (1974) ..... 4, *passim*
ıres Trading Act, Pub.L.No. 95-405, 92 Stat. 865 (1978) 18
modity Exchange Act, 7 U.S.C. §1 *et. seq.*, as amended by Pub.L.No. 95-405, 92 Stat. 865 *et. seq.* (1978) ..... 18, *passim*
§2(a)(1), 7 U.S.C. §2 (Supp. III 1979) 22, 23
§4b, 7 U.S.C. §6b (1976) ..... 5, *passim*
§4d, 7 U.S.C. §6b (1976) 20
§4e, 7 U.S.C. §6e (1976) 20
§4k, 7 U.S.C. §6k (1976 & Supp. III 1979) 20
§4m, 7 U.S.C. §6m (Supp. III 1979) 20
§5a(11), 7 U.S.C. 7 a(11) (Supp. III 1979) 22
§9b, 7 U.S.C. §13(b) (Supp. III 1979) ..... 5, *passim*
§14, 7 U.S.C. §18 (1976 & Supp. III 1979) ..... 19, *passim*
§14a, 7 U.S.C. §18a (1976 & Supp. III 1979) 19
§14b, 7 U.S.C. §18b (Supp. III 1979) 19, 20
§14c, 7 U.S.C. §18c (Supp. III 1979) 20
rities Act of 1933, 15 U.S.C. §77a *et seq.* 17
rities Exchange Act of 1934, 15 U.S.C. §78a *et. seq.* 17, 18
rities Acts Amendments of 1975, P.L. 94-29 §1, 89 Stat. 97 (1975) 18

No. 80-936
(Consolidated with Nos. 80-757 and 80-895

IN THE

Supreme Court of the United States

October Term, 1980

HEINOLD COMMODITIES, INC., THOMSON & McKINNON AUCHINCLOSS KOHLMEYER INC.,
Petitioners

v.

NATIONAL SUPER SPUDS, INC., *ET AL.*,
Respondents

BRIEF OF RESPONDENTS NATIONAL SUPER SPUDS, INC., ET AL.

STATUTORY PROVISIONS INVOLVED

Sections 4b and 9(b) of the Commodity Exchange Act, as amended (7 U.S.C. §§6b and 13(b), are set forth in Petitioner's Joint Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

STATEMENT OF THE CASE

The Statement of the Case of Petitioners Heinold Commodities, Inc. and Thomson & McKinnon Auchincloss Kohlmeyer Inc. is adopted except insofar as supplemented or modified hereby.

While it is accurate that neither of the Petitioners herein acted as broker for Respondents, it must be noted that Petitioners represented short sellers and that it is from this relationship that the assertion of liability under Section 4b and 9(b) of the Commodity Exchange Act arises.

While it is, perhaps, true that Respondents' claims for damages could have been presented through the administrative proceeding available under the Commodity Exchange Act, no defendant in the proceedings below has ever raised the objection that Respondents have failed to exhaust their administrative remedies.

SUMMARY OF ARGUMENT

Although the Commodity Exchange Act was extensively amended in 1974, the Court of Appeals for the Second Circuit found that Congress fully intended private damage remedies to be continued, even in the absence of Congress' express mandate. Of crucial significance to the Court below was the fact that prior to 1974, implied private remedies under the Act had been unanimously approved by a large number of federal courts, and the fact that Congress in 1974 was fully aware of that approval. The Second Circuit was therefore of the view that the question of whether Congress meant to *create* private rights in 1974 was not at issue. Rather, the appropriate form of inquiry was whether it was Congress' intent that these private rights be continued.

Recent decisions by this Court have modified the traditional approach for determining if private remedies ought to be implied under federal statutes. The Court below, in line with these decisions, determined that the critical element which must be found, according to this Court's recent holdings, is that of legislative intent. This

element must be present not only in the language and focus of the statute and its legislative history, but it also must be reflected in the underlying purposes which the statute seeks to achieve. The analysis of Congressional action in 1974 demonstrated that the requisite intent was apparent in all these factors. The Court below found that there were numerous indications throughout the legislative history that Congress meant these rights to be continued. The jurisdictional savings clause, among other convincing evidence, offered strong support for the finding that Congress did not desire to tamper with these rights.

In reaching its conclusion, the Second Circuit was guided by time-honored principles of statutory construction. One of these, the doctrine of re-enactment, provides that when the legislature re-enacts a statute, accepted judicial interpretations of statutory provisions are incorporated into that statute. In 1974, Sections 4b and 9(b) of the Commodity Exchange Act were incorporated into the amended statute in substantially the same form as they had appeared under the Commodity Exchange Act. Moreover, nowhere on the face of the statute or in the entire body of legislative history is there any indication whatsoever that Congress disapproved of the prior interpretation of these provisions which had implied private remedies.

It was the stated position of the Court below that Congress' awareness in 1974 of the existence of private remedies created a strong presumption that it meant these rights to continue. In the absence of any evidence of clear legislative intent to the contrary, the Second Circuit ruled correctly that the 1974 Congress did not mean to abrogate the private causes of action which already existed.

ARGUMENT

I.

The Proper Frame of Inquiry Is Whether the 19 Amendments Manifested an Intent on the Part Congress to Nullify Existing Implied Private Re edies Under the Commodity Exchange Act.

In the period preceding the 1974 Amendments to t Commodity Exchange Act, (the "CEA") all the cou which considered the question of whether a priva cause of action existed under the Act "apparently u formly concluded that such an action exists." *Deaktor L. D. Schreiber & Co.*, 479 F.2d 529, 534 (7th Cir. 197 *rev'd on other grounds sub nom., Chicago Mercant Exchange v Deaktor*, 414 U.S. 113 (1973). Indeed, t prevailing status of the law at the time Congress enact the Commodity Futures Trading Act (the "CFTCA" was such that it was "undisputed that a private cau of action may be maintained under the Commodity E change Act." *Case & Co., Inc. v Board of Trade of t City of Chicago*, 523 F.2d 355, 360 (7 Cir. 1975).

The first reported decision which recognized an i plied private remedy was *Goodman v H. Hentz Co.*, 2 F.Supp. 440 (N.D.Ill. 1967). *Goodman* was followed by long line of decisions in which the implied remedy ceived unanimous endorsement from more than a "f federal courts."[2]

---

1. Commodity Futures Trading Act, Pub.L.No. 9 463, 88 Stat. 1389, *et seq.* (1974)

2. Petitioner's statement that private remed were implied by a "few federal courts prior to 1974" misleading. (Brief of Petitioner Clayton Brokerage C of St. Louis, Inc., p. 44.) See *Hirk v Agri-Research Cou cil, Inc.*, 561 F.2d 96 (7th Cir. 1977); *Case & Co., Inc*

Although the majority of these cases found
vate remedy under Section 4b in a broker-client
tion, none of the decisions limited liability either
broker-client relationship or to the anti-fraud prov
of the Act. In *Deaktor,* the Court of Appeals f
Seventh Circuit held that plaintiff traders had a p
damage action against an Exchange for a violat
the anti-manipulation provisions of the Act, S
9(b), 7 U.S.C. 13(b). 479 F.2d at 534.[3]

The widespread judicial recognition which w
forded to the existence of an implied private rem
all the pre-Amendment cases makes it fitting to
the judicial precept that "Congress is presumed
aware of an administrative or judicial interpretat
a statute . . ." *Lorillard v Pons,* 434 U.S. 575, 580 (
or equally "appropriate to assume that our electe

Board of Trade of the City of Chicago, 523 F.2d 35
Cir. 1975); *Deaktor v L. D. Schreiber & Co.,* 479 F.
(7th Cir. 1973); *Booth v Peavey Company Comm
Services,* 430 F.2d 132 (8th Cir. 1970); *Bartley v.
Commodities Associates Inc.,* CCH Com. Fut. L
¶20,123 [1975-1977 Transfer Binder] (S.D. N.Y. 1
Seligson v New York Produce Exchange, 378 F.
1076 (S.D.N.Y. 1974); *Arnold v Bache & Co., In
F.Supp. 61 (M.D. Pa. 1973), Johnson v Arthur
Shearson, Hamill & Co.,* 341 F.Supp. 764 (S.
1972); *Gould v Barnes Brokerage Co., Inc.,* 345 F
294 (N.D. Tex. 1972); *McCurnin v Kohlmeyer & C
F.Supp. 1338 (E.D. La. 1972), aff'd,* 477 F.2d 11
Cir. 1973); *United Egg Producers v Bauer Int'l
311 F.Supp. 1375 (S.D.N.Y. 1970); *Anderson v Fra
duPont & Co.,* 291 F.Supp. 705 (D.Minn 1968); and
man v H. Hentz & Co., 265 F.Supp. 440, (N.D.Ill.

3. See *Case & Co., Inc. v Board of
Chicago,* 523 F.2d 355; *United Egg Producers v
International Corp.,* 311 F.Supp. at 1384; *Seligson
York Produce Exchange,* 378 F.Supp. at 1084.

resentatives, like other citizens, know the law
v University of Chicago, 441 U.S. 677, 696-69
Moreover, since the current status of the la
peatedly brought to Congress' attention,[4] ther
justification to presume that in 1974 Congres
only aware of the prior interpretation of the
that "that interpretation reflects their inten
spect to [the CFTCA]." *Cannon v University o*
441 U.S. at 697-698.

It is not in the least surprising that the S
cuit found that, in the fact of Congressional
1974, an implied private remedy was "imp
proved" (JA 128), and that given the current
the law and Congress' knowledge of that st
burden thus lies on those who urge that the 19
ments demonstrate an intention to change pri
. . . that, on making the changes it did Congre
mindedly forgot' to repeal the private cause
[JA 128, quoting Justice Powell's dissent ir
University of Chicago, 441 U.S. at 742].

Thus, the proper framework of the prese
as correctly stated by the Court below, is not
was Congress' intent to create a private caus
in 1974, but whether Congress, through its
tended to *abolish* any existing right in the
making other changes in the Act. (JA 127)
v Lerner, 485 F.Supp. 871, 875 (D.N.J. 1980

The question of whether Congress intende
an express or implied cause of action is a q
statutory construction *Transamerica Mort*
visors, Inc. v Lewis, 444 U.S. 11 (1979). Statu
ciples are likewise applicable where the cruci

---

4. See pp. 14-15 *infra.*

is whether Congress intended to abolish ated private rights through the subsequ of a statute. The ruling by the Second Cir gress' silence in 1974 demonstrated appro tinued existence of implied private remed ent with a cardinal rule of statutory cons Court has ruled on numerous occasions th peals of pre-existing rights should not b ought not to be found in the absence of gressional intent to repeal those rights o able conflict between the prior law and th See *Tennessee Valley Authority v Hill,* 437 190 (1978); *Morton v Cancari,* 417 U.S (1974), *Posadas v National City Bank,* 29 (1936). Nor has this principle been limit cation to situations involving express sta This cardinal rule has also been applied i cide whether Congress, by enacting a stat repealed judicially recognized common la cordingly, this Court ruled that implied only be found where

> "... that result is imperatively requi say, unless it be found that the pre-ex so repugnant to the statute that the st right would in effect deprive the subs of its efficacy."

Texas and Pacific Railway Co. v Abilene 204 U.S. 426, 437 (1907); See *Nader v A lines, Inc.,* 426 U.S. 290, 298 (1976).

Far from depriving the Act "of its effi tinued existence of private damage actions ly constistent with the express remedial p vided for future traders, i.e. Commission r ceedings and contract market arbitratio

Private actions also serve a useful funct
trader protection, a fundamental pur
Moreover, the Commodity Futures Tra
(the "Commission") has not found a
among these three rights which, in its v
commodity traders an election of rem
See 41 *Fed.Reg.* 3994 (1976); 41 *Fed.*
(1976); *Stucki v American Options Co*
Fut.L. Rep., ¶20,559 at 22,283 (CFTC,

Some courts which have concluded
below, that private causes of actions h
1974 Amendments, found it unnecess
analysis set forth in *Cort v Ash,* 422
where the survival rather than the cre
cause of action was at issue. See e.g. *
Whittier & Co., Inc., 459 F.Supp. 733
Jones v B. C. Christopher Co., 466
Kansas). The Court below, however, w

---

5. The interpretation of a statu
charged with its administration is ent
able deference. *Udall v Tallman,* 380 U.S

In "Statement of the CTFC Conce
Private Litigation under the Doctrine
diction," the following is indicative of
view:

> "On the other hand, private litigat
> ages for alleged violations of prov
> will rarely, if ever, involve issue
> review by the Commission under th
> mary jurisdiction. The judicial re
> vate fraud action, for example,
> application of specific statutory
> particular conduct alleged. The is
> particular fraudulant scheme, how
> are entirely within the conventio
> Courts to resolve . . ."
> 41 *Fed. Reg.* 18472 (May 5, 1976).

that the enactment of the CFTC
plete overhaul of the Act" (JA 111
it appropriate to apply the more
Cort test rather than to rely ex
sumption that long-standing judi
plied private remedies are meant
affirmative expression of a contr
Accord Smith v Groover, 468 F.Su
Nevertheless, the attention given
to the unqualified judicial approv
age remedies prior to 1974 canno
observed that

> "When a principle has become
> decisions, there is no occasion
> unless it wishes a change." (J

The Court's conclusion that imp
continued to survive was warra
analysis as it has recently been re
Cannon v. University of Chicag
Touche Ross & Co. v. Redington, 4

II.

**Plaintiffs Are Members of the Cla
Benefit' the Commodity Excha**

The focal inquiry here und
analysis is whether Congress int
edy. See *Touche Ross & Co. v Redi*
Transamerica Mortgage Advisors
The first three *Cort* factors—"the
the statute, its legislative histor
are traditional indicators of legi
Ross, 422 U.S. at 575-576. Thus, a
inquiry is whether the statutory p

for the benefit of a special cla
is a member," *Cannon v Univer*
at 689; that is, whether the st
conduct or created federal right
ties." *Touche Ross & Co. v Redi*

The plaintiffs are traders
commission merchants ("FCM
fraud provisions of Section 4b
and the prohibition against ma
tion 9(b), 7 U.S.C. Section 13

---

6. Section 4b provides in p
"It shall be unlawful (1)
tract market, . . . in or in c
to make, or the making of
any commodity . . . for or
or (2) for any person, in
order to make, or the ma
sale of any commodity for
on behalf of any other pers

> (A) to cheat or defra
> defraud such other pe
> (B) willfully to mak
> such other person any
> thereof, or willfully t
> tered for such person
> (C) willfully to decei
> such other person by
> regard to any such
> disposition or executi
> contract, or in regar
> performed with respe
> tract for such person;"

7. Section 9(b) provides

"It shall be a felony p
more than $500,000 or im
than five years, or both, t
prosecution, for any pers
tempt to manipulate the p

enactment and later evolut
strate a clear intent on the
future traders. The princi
tures Act of 1922, forerun
manipulative practices whi
market. In 1922, the Senat
and Forestry stated that

> "[t]ransactions in gra
> public for speculation .
>
> "it is . . . clear that fluc
> are detrimental to farm
> S.Rep.No. 871, 67th Co

In 1936 when Congress
change Act, it was appare
tected under federal comm
include speculators." H.R.
2d Sess. 84 (1978). In 1
amended the 1922 Act in
and honest dealing on the
H.R.Rep.No. 421, 74th Con
protect hedgers and others
No. 1431, 74th Cong., 1st Se

> interstate commerce,
> subject to the rules o
> corner or attempt to c
> knowingly to deliver
> transmission through
> merce by telegraph,
> means of communica
> knowingly inaccurate
> market information or
> to affect the price of
> commerce, or knowing
> section 6, 6b, 6c(b) th
> of this title, . . ."

Section 4b prohib
nection with futures
1936 Amendments.[8] A
the purpose of this leg

> "honesty in the co
> [which] affect vi
> whether they be p
> that class of citiz
> haps aptitude, fo
> modities. . . ." H.
> Sess. 3 (1935).

When Congress a
ment the regulatory as
a major concern was t
to future traders unde
of speculators into th
situations mandant[i
futures trading regul
Cong. 2d Sess. 39 (197
speculator performs a
the futures market."
1974); See S.Rep. No. 9

Commenting on t
viously unregulated fu
stated that "there is n
one of the currently ur
not receive the same p
in the currently regul
975, 93 Cong. 2d Sess. 7

The Court below
almost "self-evident"

---

8. The Commodi
No. 74-675, Section 5, 4

trading was for the
(JA 136) Indeed, n
Second Circuit that
satisfied. Some of
court,[9] found that
under the Act as a
traders in the futu
persons Congress s
Fischer v Rosentha
Mullis v Merrill Ly
492 F.Supp. 1345, (

While Sections
create private right
proscribe certain c
factor recommende
non, this Court exp
ing language of the
accurate indicator
a cause of action."
history of the CE
"duties" created in

---

9. The district
Robert Dole that a
1974 amendments w

> "[to protect] a
> to protect any
> in futures mar
> (Sept. 9, 1974)

10. The Secon
9(b) is a penal pro
find implied remedi
J. I. Case Co. v Bo
Ash, Justice Brenn
possibility of findi
statutes. ("Clearly
not necessarily *pre*

to benefit a sp
ities exchange

Thus, appl
—the languag
favors the con

**The Legislativ
gressional**

Congress
of private acti
numerous refe
ing "overwhel
with implied p

Notable a
made by Repr
House Commit
marks that "c
individual litig
110 Cong. Rec.

During th
amend the CE
a commodities

---

of action for d
Brennan found
of a shareholc
forbid corpora
cal contributio
sions of this C
basis for infer
sort lay in fav
should be alig
was clearly e
traders.

tified that private damage actions were available under the Act. *Hearings on S.2485, S.2578, S.2837 and H.R. 13113 before the Senate Committee on Agriculture and Forestry,* 93rd Cong. 2d Sess. 205, 737, 746 (1974). See also *Hearing on H.R. 11955 before the House Committee on Agriculture,* 93rd Cong. 2d Sess. at 139 and 249 (1974).

The Court below found that the 1974 Amendments provided the proper circumstances in which to apply "the well-recognized cannon of construction that the re-enactment of a statute incorporates preceding judicial interpretations," *Van Vranken v Helvering,* 115 F.2d 709, 719, (2d Cir., 1940), *cert. denied,* 313 U.S. 585 (1941), quoted at JA 144; See also *Shapiro v United States,* 335 U.S. 1 (1948); *Commissioner of Internal Revenue v Bilder,* 289 F.2d 291 (3d Cir. 1961); *Francis v Southern Pacific Co.,* 333 U.S. 445 (1948). As noted by the Court, this canon has not been limited to situations where prior judicial interpretations have been supplied by a court of the highest order. See *Lorillard v Pons,* 434 U.S. 575 (1928); *Electric Storage Battery Co. v Shimadzu,* 307 U.S. 5, 14 (1930). See also *CIR v Noel's Estate,* 380 U.S. 678, 682 (1965) [a "long-standing administrative interpretation applying to a substantially re-enacted statute, is deemed to have received Congress' approval"]; *Cannon v. University of Chicago,* 441 U.S. at 697 [law which elected representatives were "assumed to know" was construction of Title VI by lower federal courts].

Petitioner Clayton asserts, however, that the re-enactment doctrine cannot be applied in this case since . . . "Congress did not put its imprimatur on the language of Sections . . . 4b and 9(b) by re-enacting that language," . . . and since Congress "amended the CEA"

rather than enacting "an entirely new statute". (Brief of Petitioner Clayton Brokerage Co. of St. Louis, Inc. pp. 42-43) Petitioner's arguments are misguided, however. The appearance of a provision in a re-enacted statute in a form which is substantially similar to its original form is the very reason for invoking the canon. See *United Shoe Workers of America AFL-CIO v Bedell,* 506 F.2d 174 (D.D.C. 1974) [words or phrases taken from prior legislation are to be given same meaning].

Petitioner's second argument that the CEA was amended rather than re-enacted in 1974 is similarly without merit. Apart from the fact that the 1974 amendments constituted "the first complete overhaul of the Commodity Exchange Act since its inception," H.R. Rep. No. 93-975 at 1, Petitioner offers no convincing reasons weighing against the application of this canon. Moreover, the re-enactment doctrine *has* been applied to an amended version of a statute where the legislature does not substantially change a section in an amendatory act, and therefore impliedly approves a pre-existing construction of that section.[11] *Grand River Dam Authority v National Gypsum Co.,* 352 F.2d 130, 136 (10th Cir. 1965).

---

11. Petitioners Heinold Commodities, Inc. and Thomson & McKinnon, Auchincloss Kohlmeyer, Inc. ("Heinold and TMAK") have also attempted to discredit the use of the re-enactment doctrine. Heinold and TMAK cite the *Lorillard* decision as authority for the proposition that application of this doctrine is exclusively limited to situations where a statute is re-enacted without change. (See Brief of Heinold & TMAK at p. 36) In *Lorillard,* this Court stated:

> ". . . where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law . . ." 434 U.S. at 581.

Assuming, *arguendo*, that the re-enactment doctrin were not applicable, this Court has stated that Congres sional action must be evaluated in light of its "contem porary legal context" *Cannon v University of Chicago* 441 U.S. at 698-699. Thus, the relevant inquiry is no "whether Congress correctly perceived the then state o the law, but rather what its perception of the law was." *Brown v G.S.A.*, 425 U.S. 820, 828-29 (1976), quoted i *Cannon v University of Chicago*, 441 U.S. at 710-11. I 1974, Congress perceived, and correctly so, that implie private causes of action were permitted under the CEA Moreover, the judicial climate during the period of 1960' and the early 1970's was so receptive to the implicatio of private remedies that this Court described it as on in which it "had consistently found implied remedies." *Cannon v University of Chicago*, 441 U.S. at 698. Eve prior to the decision in *Goodman v Hentz*, a long paralle line of cases held that private damage actions could b maintained under various provisions of the Securitie Laws. *Karden v National Gypsum Co.*, 69 F.Supp. 51 (E.D. Pa. 1946); *Fischman v Raytheon Mfg. Co.*, 18 F.2d 783, (2d Cir. 1951); *Baird v Franklin*, 141 F.2d 23 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944); *J. I. Cas Co. v Borak*, 377 U.S. 426 (1964).[12] Whether or not al

---

Helvering v Hallock, 309 U.S. 106 (1940), relied o by Petitioners, is clearly distinguishable from th instant cases in that in *Helvering*, there was n "long uniform administrative construction" of th statutory provision at issue. 309 U.S. at 121, n. 7 (See Brief of Petitioners Heinold and TMAK a pp. 35-36).

12. The Court below found that the analogy be tween the Securities Exchange Act and the CEA wa particularly worthy of comment, since "the 1936 amend ments arose from an explicit concern to make protectio in the commodities field as strong as it was in the securi

of these cases were correctly decided in light o
Court's recent pronouncements in *Touché* and *Can*
not important here, for Congress in 1974 cannot
monished for failing to anticipate these decisions. *A*
Court below aptly observed "[t]he question here
whether all these decisions were wrong in light
preme Court opinions of the past four years, . .
whether the 1974 Congress was not justified in a
ing they would be followed with respect to the
(JA 116)

Given the circumstances surrounding the enac
of the 1974 Amendments, it was not unreasonable f
Court below to require a strong showing of legis
intent to abolish private causes of action unde
CEA. (JA 146) Yet the legislative history is dev
any reference which reveals Congress' lack of ap
of these rights or any intent to abrogate them. *Al*
Lerner, 485 F.Supp. at 878. Petitioners take the po
however, that the regulatory scheme provided by
gress when it enacted the CEA in 1936, the CFT
1974 and the Amendments of 1978[13] demonstrat
intent on the part of Congress that these remed
exclusive. Furthermore, the Petitioner states that
withstanding the decisions of several courts which
nized or gave effect to purported causes of action

---

ties field." (JA 116, n.5) As the Court noted, p
remedies under the Securities' Exchange Act
consistently upheld even though the Act contai
"panapoly of other remedies." The Court aptly obs
that "[t]he silence of the 1974 Congress with resp
private causes of action for violations of the CEA
no more significant than the similar silence of th
Congress which extensively amended the Securiti
change Act, 89 Stat. 97." (JA 128)

13. Futures Trading Act of 1978, Pub.L. No. 9
92 Stat. 865

on the CEA, no such right of action has ever in
isted."[14] If Petitioner's assertion is correct,
courts located in virtually all of the major co
trading centers were granting relief under non-
remedies for nearly a decade prior to Congress
tion in 1974. Had this been the case, this practi
would have prompted Congress to express its dis
in some affirmative manner. Congressional silenc
does not square with Petitioner's theory.

Some courts which have held that the 1974
ments abolished pre-existing private remedies
pressed the view that Congress intended the new
tions procedure in Section 14 of the Act, 7 U.S
to be the exclusive private remedy under the ne

---

14. Brief of Petitioner Clayton, p. 45

15. Section 14, 7 U.S.C. 18 provides in p
part:

(a) Petition

Any person complaining of any violatio
provision of this chapter or rule, regulation,
thereunder by any person who is register
section 6d, 63, 6j, or 6m of this title may
time within two years after the cause of a
crues, apply to the Commission by petitio
shall briefly state the facts, whereupon, i
opinion of the Commission, the facts the
tained warrant such action, a copy of the c
thus made shall be forwarded by the Comm
the respondent, who shall be called upon t
the complaint, or to answer it in writing,
reasonable time to be prescribed by the Co

(b) Investigation and hearing

If there appear to be, in the opinio
Commission, any reasonable grounds for in
ing any complaint made under this section,
mission shall investigate such complaint
if in its opinion the facts warrant such acti

The reparations provision allows per
aggrieved by violations of any rule, provi
lation of the Act to file an administrative c
the Commission. The Commission must th
whether reasonable grounds exist for initia
trative proceedings. A reparations order
appeal in the court of appeals and is enfo
district courts. However, Section 14 is o
to violations committed by those who are
required to register under the Act.[16] The
correctly reasoned that Congress could no
to substitute reparations procedures for pr
actions since the ultimate effect of such an i

---

said complaint served by registered ma
fied mail or otherwise on the respond
such person an opportunity for a he
before an Administrative Law Judge
the Commission in any place in which
son is engaged in business: Provided,
plaints wherein the amount claimed
does not exceed the sum of $5,000, a
not be held and proof in support of
and in support of the respondent's a
supplied in the form of depositions or
ments of fact.

(c) Determination

After opportunity for hearing o
where the damages claimed exceed the
has been provided or waived and o
where damages claimed do not exce
$5,000 not requiring hearing as provid
Commission shall determine whether
spondent has violated any provision o
or any rule, regulation, or order there

16. Sections 4d, 4k, 4e and 4m require
tion under Act of FCMs, certain associa
floor brokers, commodity trading advisors
ators.

would be to free from private liability
operators and exchanges who were forn
private damage suits. (JA 148, 149) The
tory of the CFTCA indicates that by esta
comprehensive regulatory scheme, Cor
"to extend further protection to the exc
rather than to extinguish existing forms
Curran v Merrill Lynch, Pierce, Fenne
F.2d 216, 232 (6th Cir. 1980). Chairman
fore the House of "new customer prote
under the Act. 120 Cong. Rec. 10737 (
Similarly instructive are the remarks
madge.

> "The vesting in the Commission of
> have administrative law judges and
> spectrum of civil and criminal pena
> not intended to interfere with the
> way." 120 Cong. Rec. 30459 (Sept. 9

---

17. The remarks later made by Sen
on the floor of the Senate during the deli
1978 Amendments are persuasive evide
that Congress intended the reparations
an alternative remedy to private suits. In
amended Section 14 to increase the doll
ration claims that could be handled by
without resort to a hearing. Senator H
that the Commission was plagued with
backlog" of reparation cases, a situation
pounded by the "unfortunate position"
Federal district courts that the reparati
intended to provide an exclusive remedy
dleston explained that with the proposed

> ". . . an agrieved commodity custo
> to obtain more expeditious treatme
> *should the customer elect to pursue*
> *rations rather than proceed to arbit*
> *in court the private right of action*
> *judicially implied for violations if ce*
> *of the Commodity Exchange Act,*

In addition, to the reparations
Amendments added another form
7 U.S.C. 7a(11)[18] This section requ
to provide arbitration procedure
grievances against its members. Ho
procedure by the customer is expre
the Act. The informal nature of
dures coupled with the permissive l
ations provision (an individual "ma
remedies), favors the conclusion
were intended "as a supplement, t
stitute for the existing private rig
v Groover, 468 F.Supp. at 114.

The Second Circuit relied on t
ings clause, Section 2(a)(1), 7 U.
dence of Congressional intent to pr
dies. (JA 153, n. 36). When first
the exclusive jurisdiction section
part

> "Provided, that the Commissio
> jurisdiction of transactions de
> or relating to contracts of sal

---

future courts may recognize f
the act." (Emphasis added) 12
10537 (July 12, 1978)

18. Section 5a(11) requires c

> "Provide a fair and equita
> arbitration or otherwise (such
> registered futures association
> ing for such procedures) for
> tomers' claims and grievances
> or employee thereof: Provide
> such procedure by a custome
> (ii) the procedure shall not
> claim in excess of $15,000 . . ."

> future delivery . . . And prov
> ing herein contained shall
> jurisdiction at any time con
> Exchange Commission or o
> ties under the laws of the
> 13113, Section 201.

Although reaction by the Senat
by no means limited to concer
existence of private rights, the fe
would be barred access to the c
hearings before the Senate Comm
expressed concern that this pro
reparations provision, might h
hibiting all court actions under
testified: "Unfortunately, the H
not authorize (treble damage a
of that Bill may prohibit all cou
S. 2485, S. 2578, S. 2837 and H.R.
Committee on Agriculture and
Sess. p. 1 at 205. Similar warni
mony of Professor Roy A Schotl
Clearwaters, Assistant Attorne
obvious response to these wa
added a sentence to the House

> "Nothing in this section sha
> jurisdiction conferred on co
> or any State." H.R. 13113 a
> Committee, Section 2(a) (1
> 1131. 93rd Cong, 2d Sess. 5

This sentence, after what must
sideration by the Congress, is n
tion 2(a) (1), 7 U.S.C., Section
Conference Committee which ad
ment explained:

"... nothing in the Act
jurisdiction presently
United States or any st
34997 (Oct. 10, 1974).

In sum, nothing in the
suggests that Congress in 1
rights of action. To the cont
rectly concluded that there
Congress' affirmative intent
tinue to exist.

I

**The Continuation of Implie
Effectuate the Statutor
Exchange Act.**

The third question u
whether or not the implica
"consistent with the under
lative scheme." 422 U.S. at 7

In *Canon*, this Court ex
right of action "is necessa
accomplishment of the stat
decidedly receptive to its im
Cannon v University of Chic
purpose of the CEA is "to in
dealing on the commodity e
vesting public. Implied priv
only "helpful" but "necessa
of the Act. When Congres
its goal was to improve the
of the Act, which was inade
ket practices. See H.R. Rep
Sess. 48 (1974). A continu

totally consistent with t
the Commission itself h
remedies are *necessary*
resouces which are insu
commodity-related trans
Curiae, p. 34 cited in O
also *Berenson v Madda*
Rep. ¶20,689 (D.D.C. 19
5).

Congress' awarenes
existence of private lit
Huddleston's remark th
cases placed an "undue
gram." 124 Cong. Rec. Se

The CFTC and the S
are both federal agencie
tion and enforcement
schemes. Both agencies
loads which tend to imp
form their enforcement
Borak, this Court held
provide a "necessary su
. . ." since "the possibilit
most effective weapon in
377 U.S. at 432.[19] The

---

19. In *Borak* this
could be brought under
change Act of 1934, the
tion of proxies. This C
that the Securities Exc
ine a large volume of
was thus unable to ad
sentations set out in t
Second Circuit observed
resources to effectively
transactions. (JA 170)

Circuit, observing
Commission "does
enforce" its statute

"[a]bsent judi
action, the fed
fail to provide t
rities industry
son v Flescher
cert. den., 436

The CFTC is a
Exchange Commis
cannot possibly dis
tions effectively and
tion complaints. It
under the CEA, pri
essary supplement

**A Private Cause o
change Act Is
Law.**

The answer to
analysis, "is the ca
gated to state law,
infer a cause of a
422 U.S. at 78, does
The claims here are
law." Courts have
provision of Sectio
the applicability of
modity futures tra
Ltd. v Bell, 262 Ar
denied, 436 U.S. 95

Wholesalers, Inc.
(Minn., January
Inc., 555 S.W. 2d
the district court
favors implicatio
is not a case whe
basically of conce
of Chicago, 441 U.

In *Touche R*
that the four fact
edies under the *C*
weight. 422 U.S.
where all four f
cause of action, "
. . . factors; all of
v University of C

For th
Super Spuc
to affirm th
Second Cir

Of Counsel

JAMES A. L
MAIRA BAR
HOLLINSHE
230 Grant
Pittsburgh,